

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
QUALCOMM INCORPORATED)	
)	WT Docket No. 02-234
Petition for Waiver of Certain)	
Terms and Conditions of its)	
Auction Discount Voucher)	
)	
)	

ORDER

Adopted: November 22, 2002

Released: November 27, 2002

By the Commission:

I. INTRODUCTION

1. In this Order, we take action on Qualcomm Incorporated's (Qualcomm's) petition¹ seeking a waiver of certain terms and conditions of the Auction Discount Voucher (ADV) the Commission granted to Qualcomm in June 2000.² We grant Qualcomm's request that the Commission permit the ADV to be used for payment of outstanding auction obligations, including installment payments, interest and fees, rather than solely for future auction obligations. Specifically, we waive the requirement that the ADV be used in auctions taking place within three years after June 8, 2000, and allow the ADV to be used to satisfy auction obligations owed by licensees using Code Division Multiple Access (CDMA) technology in connection with licenses initially awarded after Auctions 5, 10, and 11. As discussed in more detail below, we find that this approach will both fulfill the mandate of the U.S. Court of Appeals for the District of Columbia Circuit³ and will serve the public interest by enabling Qualcomm to realize the benefit of the ADV.

II. BACKGROUND

A. ADV History

2. In 1992, under the Commission's former pioneer preference program,⁴ Qualcomm applied for

¹ In the Matter of Qualcomm Incorporated Petition for Waiver of Auction Discount Voucher Terms and Conditions, *Petition of Qualcomm* (filed August 1, 2002) (*Qualcomm Waiver Petition*).

² For the specific terms and conditions applicable to the ADV see Qualcomm Incorporated Petition for Declaratory Ruling Giving Effect to the Mandate of the District Columbia Circuit Court of Appeals, *Order*, 16 FCC Rcd 4042, 4051-52 (2000) (*Qualcomm ADV Order*).

³ See *Qualcomm Inc. v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

⁴ Prior to the early 1990s, the Commission used a system of lotteries and comparative hearings to assign licenses for
(continued....)

a pioneer's preference in the broadband Personal Communications Service (PCS) proceeding, based on its development of Code Division Multiple Access (CDMA) technology for broadband PCS.⁵ In an Order issued in December 1993, the Commission denied Qualcomm's application.⁶ The D.C. Circuit, however, in January 1997 vacated that determination and remanded the case to the Commission.⁷

3. Based on its interpretation that the Balanced Budget Act of 1997 had withdrawn its authority to grant any additional pioneer's preferences, the Commission on September 11, 1997, dismissed all pending preference applications, including Qualcomm's.⁸ Qualcomm successfully appealed this decision to the D.C. Circuit and in July 1999 that court ordered the Commission to "forthwith . . . grant a pioneer's preference to Qualcomm and to take prompt action to identify a suitable spectrum and award Qualcomm the license for it."⁹

4. Because the spectrum Qualcomm initially requested in its pioneer's preference application had subsequently been auctioned,¹⁰ the Commission and Qualcomm reached agreement on an alternative method of satisfying the court's mandate, whereby in lieu of a specific license, the Commission would award Qualcomm a transferable Auction Discount Voucher (ADV) that could be used to adjust a winning bid in forthcoming spectrum auctions. Under the terms of the ADV, Qualcomm could either use the ADV to obtain a license of its own choosing, or could transfer the ADV in whole or in part, to other auction participants.

5. Thus, on June 8, 2000, the Commission granted Qualcomm an ADV totaling \$125,273,878 million subject to certain terms and conditions.¹¹ For example, Qualcomm can only use the ADV in any

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radio communications services. Because of concerns that innovators might be hesitant to spend resources necessary to develop new services without an assurance that they would be granted a license to provide these services, the Commission adopted "pioneer's preference" rules in 1991. The pioneer's preference program sought to encourage the development of new services and new technologies, by permitting successful applicants to file license applications without being subject to competing applications. See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, GEN Docket No. 90-217, *Report and Order*, 6 FCC Rcd 3488, 3489, 3492 (1991) (*Pioneer's Preference Order*).

⁵ See Qualcomm Incorporated, Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals, WT Docket No. 99-168, DA 00-219, filed Jan. 28, 2000 at 2. See also Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Third Report and Order*, 9 FCC Rcd 1337, 1368 (1994) (*Third Report and Order*).

⁶ See *id.* at 1369-1370.

⁷ See *Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) (*Freeman*).

⁸ See Dismissal of All Pending Pioneer's Preference Requests, GEN Docket No. 90-314, *Order*, 12 FCC Rcd 14006, 14007 (1997).

⁹ See *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1381 (D.C. Cir. 1999). See also *id.* at 1376 (directing the Commission "to identify and award an appropriate license to [Qualcomm], commensurate with the spectrum it had requested in its [pioneer's preference] application").

¹⁰ The Miami-Fort Lauderdale MTA spectrum Qualcomm initially requested was won at auction by other entities. The winners of the A and B block broadband PCS licenses in the Miami-Fort Lauderdale, Florida, Major Trading Area (MTA -- M015) were Sprint Spectrum L.P., formerly WirelessCo., L.P., (A block), and PrimeCo Personal Communications, L.P. (B block). See *Ex Parte* Status Clarified: Qualcomm Incorporated, Request for a Pioneer's Preference, *Public Notice*, 12 FCC Rcd 2417 (1997).

¹¹ See *Qualcomm ADV Order*, 16 FCC Rcd at 4051-52. In addition, the Commission dismissed as moot Qualcomm's Petition for Declaratory Ruling requesting that the Commission in satisfaction of the DC Circuit's mandate award it one of six regional 20 megahertz licenses in the 700 MHz band. See *id.* at 4053.

auction in which FCC Forms 175s are accepted within three years from the effective date of the Order granting the ADV. Thus, the ADV presently expires on June 8, 2003. Additionally, Qualcomm can only use the ADV for the further development and application of CDMA, the technology upon which Qualcomm's pioneer's preference was based.¹²

B. Qualcomm's Petition for Waiver of Certain Terms and Conditions of the ADV

6. On August 1, 2002, Qualcomm filed a petition seeking a waiver of certain terms and conditions of the ADV the Commission granted to Qualcomm in June 2000. Specifically, Qualcomm requests that the Commission permit the ADV to be used for payment of outstanding obligations arising out of past auctions, including installment payments, interest and fees, rather than solely for future auction obligations.¹³

7. In its petition, Qualcomm states that contrary to expectations at the time the ADV was granted, there has been very limited opportunity for Qualcomm to use the ADV, which expires in June 2003.¹⁴ Qualcomm notes that out of thirteen auctions held since June of 2000, only one, Auction 35, involved spectrum that would be appropriate for CDMA-based technology. Qualcomm explains that although it transferred the ADV in its full amount to Leap Wireless International for use in Auction 35, the *NextWave* litigation necessitated the return of the ADV to Qualcomm.¹⁵ Subsequently, Qualcomm was able to transfer \$10,848,800 of the ADV to Summit Wireless. Qualcomm presently holds an ADV in the amount of \$114,425,078.¹⁶

8. Qualcomm requests that the Commission waive the requirement that the ADV be used in auctions taking place after June 8, 2000, and allow the ADV to be used to satisfy auction obligations owed by licensees using CDMA technology in connection with licenses initially awarded after Auctions 5, 10, and 11. If the Commission were to grant this waiver, Qualcomm indicates that it will transfer the voucher to one or more of the licensees still owing installment payments to the FCC for use in retiring their outstanding auction obligations.¹⁷ On August 16, 2002, the Wireless Telecommunications Bureau (WTB) released a public notice seeking comment on Qualcomm's petition.¹⁸ Three comments were received in support of Qualcomm's petition, no oppositions were received.¹⁹

¹² *Id.* at 4051.

¹³ *Qualcomm Waiver Petition* at 1.

¹⁴ For example, in June 2000, it was expected that spectrum in the upper 700 MHz band would be auctioned later in 2000, but this auction has been postponed several times. See Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled, *Public Notice*, DA 02-1829 (rel. July 26, 2002).

¹⁵ As Qualcomm explains, some of the licenses in Auction 35 had been re-auctioned after cancellation by the Commission following the default of NextWave Personal Communications, Inc. Leap Wireless International had been the winning bidder for many of those licenses and intended to use the ADV to purchase the licenses. The D.C. Circuit Court of Appeals on June 22, 2001, however, found that Section 525 of the Bankruptcy Code prevented cancellation of the NextWave licenses. *Qualcomm Waiver Petition* at 4. See also *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), cert. granted, 122 S.Ct. 1202 (2002). The Supreme Court heard oral argument on October 8, 2002.

¹⁶ *Qualcomm Waiver Petition* at 4-7.

¹⁷ *Id.* at 9-12.

¹⁸ Wireless Telecommunications Bureau Seeks Comment On Qualcomm Incorporated's Petition for Waiver Of Certain Terms and Conditions Of Its Auction Discount Voucher, *Public Notice*, DA 02-2006 (rel. August 16, 2002).

¹⁹ See Comments of Summit Wireless LLC Comments, Alpine PCS, Inc, and William R. Tippet.

III. DISCUSSION

9. For the reasons discussed below, we grant Qualcomm's petition and modify the terms of the ADV to allow it to be used for outstanding auction payment obligations owed by licensees using CDMA technology in connection with licenses initially awarded after Auctions 5, 10, and 11. We find that Qualcomm has demonstrated that special circumstances warrant such a modification, and that the modification will serve the public interest.²⁰

10. Moreover, we find that the same statutory provisions that afforded us the authority to initially issue the ADV also support our legal authority to modify the ADV so that it can be used to pay down outstanding auction obligations.²¹ Specifically, Section 402(h) of the Communications Act requires the Commission, upon remand from a court, to "carry out the judgment of the court," and in so doing "to forthwith give effect" to the court's judgment. Given that the opportunity to use the ADV in auctions conducted after June 8, 2000, has been limited, we find that the ADV as currently structured no longer constitutes the "appropriate remedy" that the D.C. Circuit instructed the Commission to fashion. Under Section 402(h), we are therefore authorized to alter the relief we gave Qualcomm in order to "carry out the judgment of the court."²²

11. In our *Qualcomm ADV Order*, we interpreted the judgment of the D.C. Circuit to mean that the Commission must place Qualcomm in a position as equivalent as possible to that which it would have occupied had the Commission, in 1993, awarded it a pioneer's preference under Section 309(j)(13) of the Communications Act.²³ Qualcomm's proposed change to the ADV – whereby the ADV can be used to pay down the outstanding auction obligations of a licensee that is using CDMA technology – provides a more effective vehicle for ensuring that Qualcomm promptly receives the relief to which it is entitled under the Court's mandate.

12. We clarify that this modification provides to Qualcomm an alternative for use of the ADV, in addition to the uses originally set forth in the *Qualcomm ADV Order*. All of the terms and conditions that the ADV is subject to under the *Qualcomm ADV Order*, as well as any subsequently established procedural requirements, remain in effect.²⁴

IV. CONCLUSION

13. In view of the D.C. Circuit's mandate that the Commission "'forthwith' . . . identify a suitable spectrum and award Qualcomm the license for it," given the limited opportunities that Qualcomm has had to date to use the ADV in auctions conducted after June 8, 2000, and the current state of the telecommunications industry, we waive the requirement that the ADV be used in auctions taking place after June 8, 2000, and allow the ADV to be used to satisfy outstanding auction obligations by licensees using CDMA technology in Auctions 5, 10, and 11.

²⁰ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) *cert. den.*, 409 U.S. 1027 (1972).

²¹ We relied upon Sections 4(i), 309(j)(13) and 402(h) of the Communications Act for the legal authority to initially issue the ADV. See *Qualcomm ADV Order*, 16 FCC Rcd at 4046-48. See also 47 U.S.C. §§ 154(i), 309(j)(13), and 402(h).

²² In its remand of Qualcomm's pioneer's preference application, the D.C. Circuit made specific reference to Section 402(h). See *Qualcomm v. FCC*, 181 F.3d 1370, 1374 at n.2.

²³ See *Qualcomm ADV Order*, 16 FCC Rcd at 4047.

²⁴ *Id.* at 4051-52, and n.69.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that these actions ARE TAKEN pursuant to Sections 1, 4(i), 303(r), 309(j), and 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), and 402(h).

15. IT IS FURTHER ORDERED that the Commission waives the requirement that the ADV in the amount of \$114,425,078 be used in auctions taking place after June 8, 2000, and allows the ADV to be used to satisfy outstanding auction obligations by licensees using CDMA technology in Auctions 5, 10, and 11. All of the other original terms and conditions of the ADV remain in effect.

16. IT IS FURTHER ORDERED that waiving the requirement that the ADV be used in auctions taking place after June 8, 2000, and allowing the ADV to be used to satisfy auction obligations owed by licensees using CDMA technology in Auctions 5, 10, and 11 satisfies in full the mandate of the court in *Qualcomm v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

17. IT IS FURTHER ORDERED that this Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary